The Gigek; The owners of and all other persons interested in the ship Gigek v The owners of and all other persons interested in the ship Giwi & other ships

HIGH COURT (KUCHING) — ADMIRALTY IN REM NO 27–04–96–1
IAN CHIN J
21 AUGUST 1999

Civil Procedure *— Service — Service of documents — Non compliance with unless order — Documents served one day after stipulated date — Date stipulated is public holiday — Service after 4pm be regarded as having been done the following day — Whether service at 4.04pm amounted to non compliance — Whether failure to file into court within time was also non compliance with unless order — Rules of the High Court 1980 O 62 r 8*

There were two orders, both dated the 13 October 1998 ('the orders'), which had ordered the defendants to serve the plaintiffs further and better particulars of certain paragraphs of the defence and answer certain interrogatories. By 6 January 1999, the further and better particulars and the interrogatories were not served. The plaintiffs applied for an 'unless order' on the ground that the defendants had failed to comply with the two orders. Consequently, the court on 6 January 1999 ordered that the defendants comply with the orders by 20 January 1999. Judgment was entered against the defendants on 22 January 1999 for failure to comply with the 'unless order'. The defendants later applied to set aside the judgment which was allowed by the deputy registrar. The plaintiffs appealed.

The said documents were served on the plaintiffs' advocates on 21 January 1999 being one day later than the date mentioned in the 'unless order' but as 20 January 1999 happens to be a public holiday, service was permitted the following day. Plaintiffs' counsel submitted that in order for service to be reckoned as being done on 21 January 1999, it must be done before 4pm on 21 January 1999 as otherwise it will be regarded as having been done the following day. He relied on O 62 r 8 of the Rules of the High Court 1980 ('the RHC'). The defendants filed an affidavit to say that the server had served the documents at the plaintiff's advocates office at 3.57pm. The plaintiffs on the other hand filed an affidavit to say it was served at 4.04pm which time was denoted on the proof copies together with the words 'without prejudice'. It was also argued that it was still not within time because the documents, though served on 21 January 1999, were not filed with the court until 22 January 1999 and that this is against O 26 r 1(6) of the RHC requiring the documents to be filed at the same time they are served.

Held, dismissing the appeal:

(1) No two time pieces will show exactly the same time with the result that different time-pieces may show varying times with a difference of as much as several minutes, depending on how fast or how slow it is running. Since the possibility exists that the

A defendants' server may be telling the truth and the conflicting time may be due to the respective time-pieces showing different time, the defendants' affidavit assertion cannot be dismissed as being improbable (see pp 77I–78A).

(2) 'Unless order' only adverted to the service of the documents and
B did not mention the filing of the same. Therefore, the 'unless order' only prescribed the penalty for the failure to serve and not for any failure to file. The issue here is not the construction of the meaning of the RHC but of the terms of 'unless order' of the court. The orders are clear and they relate specifically to the service of the documents and not to the filing. There is no term
C therein that the documents must be filed at the same time and therefore the 'unless order' was not meant to and did not refer to the filing of the documents. In any event, where there is doubt in the construction of the order, the defendants should be given the benefit of the doubt (see p 78C–F).

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[Bahasa Malaysia summary

Terdapat dua perintah, kedua-dua bertarikh 13 Oktober 1998 ('perintah-perintah tersebut'), yang telah mengarahkan defendan-defendan untuk menyerahkan kepada plaintif-plaintif butir-butir
E lanjut dan jelas kepada perenggan-perenggan tertentu terhadap pembelaan dan memberi jawapan kepada interogatori tertentu. Menjelang 6 Januari 1999, butir-butir lanjut dan jelas tersebut dan interogatori tersebut telah tidak diserah. Plaintif-plaintif memohon untuk suatu 'perintah kecuali' (unless order) atas alasan bahawa defendan-defendan telah gagal untuk mematuhi kedua-dua perintah
F tersebut. Akibatnya, mahkamah telah pada 6 Januari 1999 mengarahkan defendan-defendan mematuhi perintah-perintah tersebut selewat-lewatnya pada 20 Januari 1999. Penghakiman telah dimasukkan terhadap defendan-defendan pada 22 Januari 1999 kerana kegagalan untuk mematuhi 'perintah kecuali' tersebut. Defendan-defendan telah kemudiannya memohon untuk mengetepi-
G kan penghakiman itu yang telah dibenarkan oleh penolong pendaftar. Plaintif telah membuat rayuan.

Dokumen-dokumen yang dikatakan itu telah diserahkan ke atas peguam plaintif pada 21 Januari 1999 iaitu satu hari kemudian daripada tarikh yang telah dinyatakan di dalam 'perintah kecuali'
H tersebut tetapi memandangkan 20 Januari 1999 merupakan cuti awam, serahan telah dibenarkan pada hari berikutnya. Peguam plaintif menghujahkan bahawa supaya serahan itu dikira telah dibuat pada 20 Januari 1999, ia mesti dibuat sebelum pukul 4 pm pada 21 Januari 1999 kerana, jika sebaliknya, ia akan dianggap telah dibuat pada hari berikutnya. Beliau bergantung kepada A 62 k 8
I Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan-defendan telah memfailkan suatu afidavit menyatakan bahawa penyerah telah menyerahkan dokumen-dokumen tersebut di pejabat

peguambela plaintif pada pukul 3.57 pm. Plaintif-plaintif sebaliknya telah memfailkan suatu afidavit menyatakan bahawa ia telah diserahkan pada pukul 4.04 pm di mana masa telah ditandakan di atas salinan-salinan bukti bersama dengan perkataan 'tanpa prejudis'. Ia juga telah dihujahkan bahawa ia masih bukan di dalam tempoh masa kerana dokumen-dokumen tersebut, walaupun telah diserahkan pada 21 Januari 1999, telah tidak difailkan di mahkamah sehingga 22 Januari 1999 dan bahawa ini adalah bertentangan dengan A 26 k 1(6) KMT yang memperuntukkan dokumen-dokumen tersebut difailkan pada hari yang sama ia diserahkan.

Diputuskan, menolak rayuan tersebut:

(1) Tiada dua jam akan menunjukkan dengan tepat masa yang sama dan ini membuktikan bahawa jam yang berbeza mungkin menunjukkan masa yang berbeza dengan perbezaan beberapa minit, bergantung kepada secepat mana atau perlahan mana ia bergerak. Memandangkan kemungkinan wujud di mana penyerah defendan-defendan mungkin memberitahu apa yang benar dan masa yang bercanggah mungkin disebabkan oleh alat-alat masa yang bercanggah, kenyataan afidavit defendan-defendan tidak boleh ditolak sebagai tidak mungkin (lihat ms 77I–78A).

(2) 'Perintah kecuali' hanya merujuk kepada serahan dokumen-dokumen tersebut dan tidak menyebut untuk pemefailan yang sama. Oleh itu, 'perintah kecuali' tersebut hanya menentukan penalti bagi kegagalan untuk serahan dan bukan untuk apa-apa kegagalan untuk memfail. Isu di sini bukanlah mengenai maksud konstruktif KMT tetapi adalah berkaitan dengan terma-terma 'perintah kecuali' mahkamah. Perintah-perintah tersebut adalah jelas dan berkaitan khususnya kepada serahan dokumen-dokumen tersebut dan bukan kepada pemefailan. Tiada terma di dalamnya bahawa dokumen-dokumen tersebut mesti difailkan pada hari yang sama dan, oleh demikian, 'perintah kecuali' itu tidak bermaksud dan tidak merujuk kepada pemefailan dokumen-dokumen tersebut. Dalam apa keadaanpun, di mana terdapat keraguan di dalam pembikinan suatu perintah, defendan-defendan hendaklah diberi faedah kesangsian (lihat ms 78C–F).]

Notes

For cases on service, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4069–4160.

Legislation referred to

Rules of the High Court 1980 O 26 r 1(6), O 62 r 8

Albert Tang (*Chew Jugah Wan Ullok & Co*) for the plaintiffs.
Richard Poh (*Kho & Poh*) for the respondents.

Cur Adv Vult

Ian Chin J: This appeal arose out of the setting aside of a judgment entered on 22 January 1999 against the defendants who are owners of the vessels named Giwi, Giwi II, Gikim, Giswee, Gisoon, Gijoo and Gihuat. Judgment was entered on the ground that the defendants had failed to comply with an 'unless order'. The defendants applied to set aside the judgment on the ground, inter alia, that the said judgment was entered irregularly since there was no default on the part of the defendants in complying with the two orders. The two orders, both dated the 13 October 1998 ordered the defendants within 21 days from the date of the order to serve the plaintiffs further and better particulars of certain paragraphs of the defence and answer certain interrogatories. By 6 January 1999, the further and better particulars and the interrogatories were not served. However, there was no question of non-compliance of that order concerning the answer of interrogatories since the interrogatories were not served. Be that as it may, the plaintiffs, being the owners of and being persons interested in the cargo, applied for an 'unless order' on the ground that the defendants had failed to comply with the two orders. Consequently, the court on 6 January 1999 made, inter alia, the following order:

> unless by the 20 January 1999, the defendants comply with the two orders of the court, both dated the 13 of October 1998, in particular, the supply of further and better particulars and the answers to the Interrogatories, as ordered; the defence will be struck out and the judgment be entered for the plaintiff with costs and interests; ... .

Those documents were served on the plaintiffs' advocates on 21 January 1999 being one day later than the date mentioned in the 'unless order' but it is common ground that in so far as the date is concerned it is in order as 20 January 1999 happened to be a public holiday and hence service was permitted the following day. However, Mr Albert Tang, learned counsel for the plaintiffs, submitted that in order for service to be reckoned as being done on 21 January 1999 it must be done before 4pm on 21 January 1999 as otherwise it will be regarded as having been done the following day. He relied on Order 62 r 8 of the Rules of the High Court 1980 ('the RHC'). There is dispute as regards the time of service, with the defendants filing an affidavit to say that the server had arrived at the plaintiffs' advocates office at 3.57pm and had served the documents at that time. The plaintiffs on the other hand filed an affidavit to say it was served at 4.04pm which time was denoted on the proof copies together with the words 'without prejudice'. The plaintiffs argued that it was more likely than not that the time of service was 4.04pm because there was no protest when it was so denoted on the proof copies that were given back to the defendants' server. However, Mr Tang overlooked one notorious fact which is that no two time pieces will show exactly the same time with the result that different time-pieces may show varying times with a difference of as much as several minutes,

depending on how fast or how slow it is running. This may bring about the result that both deponents may be telling the truth according to what their time-piece showed. Since the possibility exists that the defendants' server may be telling the truth and the conflicting time may be due to the respective time-pieces showing different time, I cannot dismiss the defendants' affidavit assertion as being improbable. The plaintiffs have to establish more than what is shown if the court is to conclude on the affidavit evidence that the plaintiffs' version of service being done at 4.04 pm is to be preferred to that of the defendants. Therefore, I will accept that the service of the documents was done within time at 3.57 pm.

Mr Tang then argued that it was still not within time because the documents though served on 21 January 1999 were not filed with the court until the 22 January 1999 and that this is against O 26 r 1(6) of the RHC 1980 requiring the documents to be filed at the same time they are served. The short answer to that contention is that the 'unless order' only adverted to the service of the documents and did not mention the filing of the same. Therefore, the 'unless order' only prescribed the penalty for the failure to serve and not for any failure to file. Mr Tang had referred to the rules requiring filing but the issue here is not the construction of the meaning of the Rules of the High Court but of the terms of 'unless order' of the court. To my mind, the two orders are clear and they related specifically to the service of the documents and not to the filing. There is no term therein that the documents must be filed at the same time and therefore the 'unless order' was not meant to and did not refer to the filing of the documents. If it was intended to include filing in the 'unless order' it could have easily been stated just as was done with service. Its absence shows that the 'unless order' was not directed at filing. In any event, where there is doubt in the construction of the order, the defendants should be given the benefit of the doubt. What more when the documents were filed on 22 January 1999.

What I have said thus far is sufficient to dispose of the matter herein. Therefore, I do not purpose to deal with the rest of the contentions. The learned deputy registrar was right in his decision in setting aside the judgment. The appeal is dismissed with costs to the defendants.

Appeal dismissed.

Reported by Benjamin Yong.